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HAROLD B. WILLEY, C

TRANSCRIPT OF RECORD
IN FOUR VOLUMES

IN THE

Supreme Court of the United States

October Term, 1953

No. 413

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Petitioners,

vs.

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Respondents.

Volume IV
(Pages 1159 to 1179)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-2-53

No. 12865

United States
Court of Appeals
For the Ninth Circuit

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Appellants,

vs.

FIDELITY - PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

Appeal from the United States District Court for the District of Nevada

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12865

United States
Court of Appeals
For the Ninth Circuit

PYOCHE MINES CONSOLIDATED, INC.,
PYOCHE MINES COMPANY, JOHN LAS-
SEY and RICHARD K. BAKER,

Appellants,

vs.

FIDELITY - PHILADELPHIA TRUST COM-
PANY, Trustee, and E. CLEMENTON METLEY
and EDWARD C. DAVIS,

Appellees.

Appeal from the United States District Court
for the District of Nevada

Transcript filed in the United States Court of Appeals
for the Ninth Circuit

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, February 5, 1953.

Before: Stephens, Healy and Bone,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Francis T. Cornish, counsel for appellants, and by Mr. J. Tyson Stokes, counsel for appellees, and submitted to the Court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Monday, March 23, 1953.

Before: Stephens, Healy and Bone,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals
for the Ninth Circuit

No. 12,865

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Appellants,

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

Mar. 23, 1953

Appeal from the United States District Court
for the District of Nevada

Before: Stephens, Healy and Bone,
Circuit Judges.

Healy, Circuit Judge:

OPINION

This is an appeal from a summary judgment granted on motion of Fidelity-Philadelphia Trust Company, plaintiff below, and from the dismissal of a complaint in intervention of Baker and a counterclaim of Pioche Mines Consolidated and its president, Janney, who were defendants.

Pioche Mines Consolidated, a Nevada corporation, hereafter referred to as Consolidated, was formed in 1928 to hold the controlling interest in

two other Nevada companies, Pioche Mines Company and Nevada Volcano Mines Company. Consolidated issued debenture bonds in the amount of several hundred thousand dollars in 1929 and 1930, mostly acquired by persons in the east. It was agreed that Fidelity-Philadelphia Trust Company, a Pennsylvania corporation, should act as trustee in these bond issues.

Thereafter Consolidated defaulted in payment of the obligations. In 1939 a group of the eastern debenture holders representing a majority of the outstanding debentures met and executed a Debenture Holders' Agreement. In this document these holders agreed, inter alia, to deposit their debentures with Fidelity as trustee to take such action relating thereto as the holders should direct, reserving to the holders the right to make a settlement agreement with Consolidated. In addition, the agreement set up a Debenture Holders' Committee of four men (two of whom survive), which was given broad powers generally to execute the agreement and to represent the debenture holders in all dealings with Fidelity and Consolidated. In 1940, on order of the Committee, Fidelity as trustee filed a diversity suit in the District Court for Nevada against Consolidated, Pioche Mines Company, and John Janney, president of Consolidated, to recover the principal and interest of the bonds. While depositions were being taken in that action, it was agreed that the suit should be settled. The result was a "Settlement Agreement," drawn up in 1942, and to which the parties were Consolidated, Deben-

ture Holders' Committee, and a creditors committee representing various creditors of the three companies. Fidelity was not a party to it.

The Settlement Agreement provided that the three Nevada companies were to be consolidated into a new company which would take title to all properties owned by the three. It further provided: (1) That Consolidated should issue 30-year income bonds to the debenture holders in exchange for the old debentures; (2) that Consolidated should issue 5-year preference notes to secure cash to finance the reorganization; and (3) that a certain amount of 30-year income notes should be issued to cover certain debts and reorganization expenses. Under the terms of this contract all parties to it agreed to use their best efforts to obtain cash in exchange for the preference notes, and also agreed to use their best efforts to obtain a long-term lease of the properties, under which the new company to be formed would have an assured income. Finally, the agreement provided for the eventual discontinuance of all legal proceedings then pending.

Difficulties arose in carrying out the Settlement Agreement. A statutory merger of the three companies under Nevada law was effected in late 1943. A dispute then arose between the parties as to whether the income bonds to be transmitted to the debenture holders complied with the Trust Indenture Act of 1933. After resolution of that issue, the impasse which resulted in the present proceedings arose. Pursuant to previous correspondence, Consolidated had sent to Fidelity, at the latter's re-

quest, most of the income bonds for transmittal to the debenture holders. The Debenture Holders' Committee thereupon instructed Fidelity to hold both the old debentures and the new income bonds, taking the position that Consolidated should complete its duties under the agreement, including the sale of the preference notes, after which a closing settlement would be held at which time all matters remaining would be settled and the old debentures delivered for cancellation. Consolidated, on the other hand, insisted that the old debentures must first be exchanged for the new income bonds. Until that was done, Consolidated contended, the preference notes would not be marketable. The result was a complete deadlock, with Fidelity holding both sets of securities, and neither party to the Settlement Agreement willing to budge.

Thereafter, in May of 1946 (the dismissal of the original suit as contemplated by the Settlement Agreement not having been effected), Fidelity filed in the District Court a pleading entitled "Supplemental Complaint." This pleading had the effect of completely changing the character of the action then pending. It alleged the execution of the Settlement Agreement by the Debenture Holders' Committee and Consolidated; set forth the terms of that agreement; and alleged that it had been performed in certain particulars, and had not been performed in others. The basic prayer of the complaint was that the court enter its order directing the parties to the action to perform the remaining unperformed obligations imposed upon them re-

spectively by the agreement at such time and in such manner as the court might direct. Consolidated answered this complaint, and at the same time moved the court to order the joinder of the Debenture Holders' Committee as party plaintiff. Also proffered at that time was a counterclaim, with a motion for leave to file. The counterclaim alleged the existence of a conspiracy between Fidelity and the Debenture Holders' Committee and the carrying out by them of certain acts for the purpose of preventing the consummation of the Settlement Agreement and for the purpose of financially crippling Consolidated so that it could be taken over cheaply by the debenture holders. The counterclaim asked for damages of $3,000,000.

While these motions were pending, Fidelity moved for summary judgment on its supplemental complaint, supported by affidavits. Before this latter motion was decided, the court denied Consolidated's motion to join Debenture Holders' Committee as a party, but granted permission to file the counterclaim. Fidelity answered the counterclaim. Meanwhile Baker, one of the parties to the contract who had not been a party to the action previously was permitted to intervene, and joined in seeking the relief prayed for in the counterclaim. Fidelity answered his complaint on the merits. Prior to the hearing on the motion for summary judgment, Consolidated filed counter-affidavits, and made numerous motions relating to the sufficiency of Fidelity's showing on its motion. After hearing, the court decided there was no genuine issue of fact raised on the supplemental complaint and the

answer to it; dismissed the counterclaim and the complaint in intervention; and rendered summary judgment for Fidelity ordering, among other things, the following: (1) That plaintiffs and defendants perform the remaining unperformed obligations of the Settlement Agreement; (2) that the securities transmitted by Consolidated to Fidelity be exchanged for the old debentures, and that the latter be deposited in court; and (3) that the plaintiffs and defendants together take the necessary steps to obtain cash for the preference notes described in the Settlement Agreement. This appeal followed.

Consolidated advances several contentions, one of which—and the only one we will notice—is that Fidelity's action should have been dismissed because of the failure of the court on Consolidated's motion to join indispensable parties, namely, the members of the Debenture Holders' Committee. See Rule 19, F.R.C.P. These parties, not being amenable to service in the district of Nevada, could not of course be brought in by process.

Responding to the claim that a dismissal was imperative because of the absence of indispensable parties, Fidelity argues that since indispensability is not jurisdictional, but is based on equity, the Debenture Holders' Committee should not be held indispensable in the circumstances of this case. We are not able to agree. As observed in 3 Moore's Federal Practice § 19.05, "the concept of indispensability goes beyond federal jurisdiction and touches the very power or the right of the court to make an equitable adjudication, where an indispensable

party is not before it. In this situation, barring exceptional equities, it should not proceed without his joinder, even though his citizenship would not destroy jurisdiction in the cases of diversity and alienage, or although it is immaterial, as when jurisdiction is based on the character of the subject matter—a federal question." No exceptional equities are discernible here.

We proceed to consider the nature of the action and the effect of the relief granted. The position taken by Fidelity in bringing its supplemental complaint appears from the statement of its counsel, which the trial judge quoted in his opinion, to the following effect: "[The Settlement Agreement is a contract which provides that] one side shall do certain things and the other side shall do certain things. There has been dispute between the two parties as to how they shall do it and who shall do it first. It has got to a point where nothing can be done, hence the supplemental complaint and presentation of the matter by Fidelity here to see what shall we do, tell us what we shall do, here is the record, give us judgment which says do this and that and we will go ahead and dispose of the matter."

As already said, the contract is between the Debenture Holders' Committee and Consolidated. Necessarily these must be the "two parties" to whom counsel refers in his statement. We gather that Fidelity and the trial judge regarded Fidelity as a sort of intermediary or stakeholder, waging the suit for the purpose of settling what the parties

to the contract should do to carry out their respective engagements. Yet one of those parties was not before the court. The judgment entered runs only against the party who was, namely Consolidated. The judgment directs that "plaintiffs and defendants" take the necessary steps to sell the preference notes; and that "plaintiffs and defendants" perform the remaining unperformed obligations under the Settlement Agreement, which obligations, by the terms of the agreement, would include also using their best efforts to secure a long-term lease of the properties. The "plaintiffs and defendants" in the lower court were Fidelity on the one hand and Consolidated on the other.

Now the Settlement Agreement plainly provided that Consolidated and Debenture Holders' Committee shall use their best efforts to sell the preference notes and to obtain the lease—not that Consolidated and Fidelity shall do so. Clearly the Committee is not bound by the order to carry out its contractual obligations; and equally clear is it that the Committee and not a trust company was expected to perform in these respects.

A leading case indicating the criteria by which to determine whether or not a party is indispensable is State of Washington v. United States, 9 Cir., 87 F 2d 421, 427-428. The court said:

> "From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following ques-

tions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

"If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable."

Asking ourselves these questions as related to the situation in the instant case, we get certain answers:

(1) Not only is the interest of the Debenture Holders' Committee not distinct and severable, but it has the only real interest in the Settlement Agreement. Fidelity, not a party to that agreement, could have no valid interest in the manner or method of carrying it out, even though it might be interested in having it performed promptly.

(2) We are unable to see how the court could render justice between the parties before it, since

the complaint was based on an allegation that the two parties to the contract had not fulfilled their obligations under it. Debenture Holders' Committee had obligations under that agreement; Fidelity had none. As to the matter of rendering justice, it is notable that the court proceeded to order Consolidated to do a number of things notwithstanding it stated in its opinion that "[t]he impasse spoken of by Fidelity in its brief was created by Fidelity's action in following the instructions of the Debenture Holders' Committee. The instructions of the Debenture Holders' Committee were in violation of the Committee's obligations under the Settlement Agreement, * * *" Yet no order was made or could be made against the absent Committee.

(3) Fidelity urges, in effect, that no injurious consequences will be visited upon the absent Committee or the debenture holders because the order runs in their favor. It points out that Fidelity has already complied with that part of the order requiring it to exchange the securities and deposit the old debentures in court. We think it more than doubtful whether the form of the relief granted is of any consequence, even though it is favorable to the absent party. See Young v. Powell, 5 Cir., 179 F. 2d 147, 151-52. It is the relief sought that determines indispensability, and here Fidelity asked that the court order the agreement to be performed. At that time, an order could very well adversely affect the debenture holders. By bringing the supplemental complaint, and by virtue of the order en-

tered, Fidelity has gone ahead and exchanged the debenture holders' past due obligations for 30-year income bonds, without the debenture holders being heard—an exchange Fidelity was instructed by the Committee not to make.

(4) Finally, it is evident that the decision below, in the absence of the Debenture Holders' Committee, is not equitable. We know of no reason, and none is shown, why the absent debenture holders and the Committee could not challenge the validity of the exchange, or why they are otherwise bound by the provisions of the order, or bound to accept as satisfactory what Consolidated might do by way of performance of its obligations under the Settlement Agreement or under the court's order.

Fidelity contends that it had authority to bring the action and bind the debenture holders by virtue of the Debenture Holders' Agreement of 1939, which it says was incorporated by reference into the Settlement Agreement. Even conceding that the 1939 agreement was incorporated into the Settlement Agreement for any purpose other than to show the authority of the Debenture Holders' Committee to enter into it (a question not entirely without difficulty) we find nothing in the 1939 agreement authorizing this action by Fidelity or purporting to bind the debenture holders. The provisions of the deposit agreement of 1939 appear to make Fidelity a depositary only, and to grant certain powers to it, including the power to bring suit to collect the original obligations. That agreement,

however, specifically reserved to the Debenture Holders' Committee, and not to Fidelity, the right "[t]o negotiate with the Pioche Company, [a] settlement for the purpose of avoiding or terminating litigation * * *" and the power "[t]o determine all details relating to the carrying out of this Agreement and any arrangement or settlement negotiated as above provided or involved in the collection, by litigation or otherwise, of the sums so due and payable." We may add that a party to a contract may assign rights under it, but he cannot assign obligations.

In summary this would appear to be a case where a trust company, not a party to a contract, asks that the contract be interpreted and the rights and obligations of both parties to it be defined and enforced, with only one party to the contract being before the court. It is a situation where the trust company, without a showing of authority, asks that the rights of the absent party be disregarded, and that the company be permitted to perform in the place and stead of such party to the extent that the latter is obligated to perform, and, further, that the party before the court be required to accept the company's volunteer performance as the equivalent of performance by the absent party.

Reversed with directions to dismiss.

[Endorsed]: Opinion. Filed Mar. 23, 1953. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12,865

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Appellants,

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

JUDGMENT

Appeal from the United States District Court for the District of Nevada.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is, reversed, with directions to the said District Court to dismiss the supplemental complaint filed therein, with costs in this Court in favor of the Appellants and against the Appellees.

It is further ordered and adjudged that the Appellants recover against the Appellees for their costs herein expended and have execution therefor.

It Is Further Ordered and adjudged by this Court, that the order or judgment of the said District Court dismissing Pioche's counterclaim to the supplemental complaint is reversed, with leave to Pioche to amend the same if so advised.

Filed and entered March 23, 1953, as amended pursuant to order entered July 27, 1953.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Monday, July 27, 1953.

Before: Stephens, Healy and Bone,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION ON REHEARING

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that the judgment heretofore filed and recorded be amended pursuant to said opinion.

United States Court of Appeals
for the Ninth Circuit

No. 12,865

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Appellants,

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

July 27, 1953

Appeal from the United States District Court
for the District of Nevada

Before: Stephens, Healy and Bone,
Circuit Judges.

Healy, Circuit Judge:

OPINION ON REHEARING

We heretofore ordered the dismissal of the supplemental complaint of appellee Fidelity in this case for absence of indispensable parties. Pioche Mines Consolidated v. Fidelity-Philadelphia Trust Co., 202 F. 2d 944. In ruling on the case we neglected the issue whether the trial court's dismissal of Pioche's counterclaim was proper. Pioche petitioned for a rehearing requesting that we pass on that matter. Fidelity was asked to present a

brief expressing its views on the subject and has done so. To this Pioche has replied, and the neglected issue is now before us for disposition.

Fidelity argues that the dismissal of its complaint renders mandatory a dismissal of the counterclaim also. We think not. Compulsory counterclaims are required to be dismissed only when the complaint is dismissed for want of jurisdiction, which was not the case here. The counterclaim persists where it is supported by an independent ground of federal jurisdiction, Isenberg v. Biddle, D.C. Cir., 125 F. 2d 741; 3 Moore's Federal Practice § 13.15. Pioche is a resident of Nevada, Fidelity of Pennsylvania; and federal jurisdiction thus rests on diversity. The Debenture Holders' Committee is not an indispensable party to the action on the counterclaim. The cause of action undertaken to be stated in the latter sounds in tort, for which liability is joint and several. In such situation the right may be asserted against any one or more of the tortfeasors, the others not being necessary parties. 3 Moore's Federal Practice § 19.11. See Rule 19, F.R.C.P.

Fidelity further contends that the counterclaim was properly dismissed on its motion for summary judgment. It says that the trial court, after a careful study of the lengthy record, determined that no genuine issue of fact was presented by the counterclaim. We do not so understand the attitude of the trial judge. His opinion clearly indicates that, as regards the counterclaim, he was dismissing the first cause of action set out in it on the ground that it attempted to state a claim against Fidelity for

breach of the Settlement Agreement, to which Fidelity was not a party. In our view a liberal reading of that count indicates an attempt to state a claim for tortious interference by Fidelity with contractual relations between Pioche and the Debenture Holders' Committee. As regards the second cause of the counterclaim, it is clear that the judge dismissed it on the narrow ground that the allegations bearing on the existence of tortious conspiracy were not pleaded with sufficient particularity, and also because it was not alleged that Fidelity had acted through any particular officers.

The granting of the summary judgment and the dismissal of the counterclaim were accomplished in a single order. Pioche moved that the order be amended to permit it to amend its counterclaim, but the motion was denied. In view of the liberal spirit as regards amendments displayed in Rule 15 F.R.C.P., we think Pioche should have been given opportunity by amendment to cure if it could the shortcomings of the counterclaim indicated by the judge.

Finally, Fidelity contends that the counterclaim was properly dismissed because directed against Fidelity in its individual capacity, whereas, it is said, Fidelity brought the supplemental complaint in its representative or fiduciary capacity. The argument proceeds on the rule that a counterclaim against a trustee in his individual capacity, where he has sued as a fiduciary only, is not permissible inasmuch as it is not a counterclaim against an "opposing party," as contemplated by Rule 13. See

Higgins v. Shenago Pottery Co., 99 F. Supp. 522; Chambers v. Cameron, 29 F. Supp. 742. We think it highly doubtful that Fidelity should be considered as having brought this action as a fiduciary in the sense of the rule. (See discussion in our original opinion of the position taken by Fidelity in the action.) In any event it would appear that Fidelity has waived the point. It answered the counterclaim on the merits and interposed no objection on the score of its status as a fiduciary. Rule 12 (h) provides that, with certain exceptions not here pertinent, a party waives all defenses and objections which he does not present either by motion or in the answer or reply. This court has interpreted the rule as to require the raising of all affirmative defenses not so excepted in the reply or by motion. Morgan Electric Co. v. Neill, 198 F. 2d 119.

The order or judgment dismissing Pioche's counterclaim is reversed with leave to Pioche to amend the same if so advised.

[Endorsed]: Opinion on Rehearing. Filed July 27, 1953. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12,865

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Appellants,

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

Before: Stephens, Healy and Bone,
Circuit Judges.

PETITION OF APPELLEE FOR FURTHER HEARING AND FOR OPPORTUNITY TO BE HEARD IN ORAL ARGUMENT

The petition of appellee for further hearing and for opportunity to be heard in oral argument is denied.

/s/ ALBERT LEE STEPHENS,

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

United States Circuit Judges.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 1178 pages, numbered from and including 1 to and including 1178, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2nd day of October, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.

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OCT 14 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953 No. 413

FIDELITY-PHILADELPHIA TRUST COMPANY,
Trustee,
Petitioner,

v.

PIOCHE MINES CONSOLIDATED, INC., PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953 No.

Fidelity-Philadelphia Trust Company, Trustee,
Petitioner,

v.

Pioche Mines Consolidated, Inc., Pioche Mines Company, John Janney and Richard K. Baker,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Fidelity-Philadelphia Trust Company, Trustee, sole surviving plaintiff in the United States District Court for Nevada and appellee in the Court below, prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgments of that Court in entertaining a premature appeal from, and reversing the order of, the District Court.

OPINIONS BELOW.

The relevant opinion and order of the United States District Court for the District of Nevada, granting summary judgment on petitioner's supplemental complaint, dismissing respondents' counterclaim thereto, and retaining jurisdiction for the purpose of making and entering such further orders as might be necessary, is not reported but appears in the printed record (R. 1053-1070). On the appeal taken by defendants (respondents herein) to the Court of Appeals, that Court wrote three separate opinions. Its first opinion and order, dated August 31, 1951, denying petitioner's motion to dismiss the appeal as premature, is reported in 191 F. 2d 399. Its second opinion and order, dated March 23, 1953 (R. 1160-1173), reversing the order of the District Court with instructions to dismiss petitioner's supplemental complaint, because of absence of indispensable parties, is reported in 202 F. 2d 944. Its third opinion and order, dated July 27, 1953 (R. 1173-1177), reversing the District Court's dismissal of the counterclaim to the supplemental complaint, has not been reported at the date hereof.

JURISDICTION.

The judgment of the Court of Appeals to which this petition immediately relates was entered on July 27, 1953 R. 1173-1177). Petitioner's request for further hearing thereon was denied by the Court of Appeals on September 2, 1953 (R. 1178). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1); Act of June 25, 1948, Chapter 646, 62 Stat. 928.

QUESTIONS PRESENTED.

Where the issues raised by a supplemental complaint and compulsory counterclaim thereto involve inextricably

and equally the meaning and legal effect of a multi-party written contract, should the Court of Appeals, in reversing the Order of the District Court dismissing the counterclaim, have directed the District Court to proceed with the trial of the counterclaim against the fiduciary plaintiff, in spite of the fact that the Court of Appeals had already held that the District Court has no jurisdiction over the supplemental complaint because of the absence of parties thereto held to be the real parties in interest and indispensable?[1]

STATEMENT.

The essential facts are well summarized in the second opinion of the Court of Appeals (R. 1160-1171; 202 F. 2d 944). The case, however, may be briefly stated as follows:

In 1940 petitioner, a Pennsylvania corporation, as trustee for holders of the debenture bonds of Pioche Mines Consolidated (herein referred to as "Pioche"), and on order of the Debenture Holders' Committee representing holders of a majority of the outstanding debentures, for whom petitioner also was acting as depositary under the usual type of Debenture Holders' Agreement (R. 98-111), filed a diversity suit (R. 2-119) in the United States District Court for Nevada against Pioche, its president Janney, and Pioche Mines Company, a predecessor in interest, all being residents of Nevada, to recover the principal and interest of the bonds, which had fallen into

[1] While this is the single question urged by petitioner as the basic reason for granting the writ, petitioner intends, if certiorari is allowed and the scope of the review is not otherwise specially limited by this Court, to argue also the closely related error of the Court of Appeals in directing a dismissal of the supplemental complaint, which was filed pursuant to F.R.C.P. Rule 15(d), and the error of the Court of Appeals in entertaining the appeal in the absence of any such determination by the District Court as is provided by F.R.C.P. Rule 54(b), particularly in the face of the District Court's express reservation of jurisdiction to enter further orders in the action, which involves multiple claims within the meaning of the latter rule.

default. (Two of Pioche's stockholders, Miller and Dale, who were residents of Pennsylvania, joined petitioner as plaintiffs, but have since died.) To this original action defendants filed an amended answer in which Pioche asserted a counterclaim for $5,000,000, based on an alleged conspiracy on the part of the Debenture Holders' Committee and others associated with them to ruin the company and take over its properties (R. 119-153, 150).

In 1942, during the course of depositions in the original action, the defendants and the Debenture Holders' Committee, together with one Baker, who represented a group of Boston creditors of Pioche, entered into a comprehensive Settlement Agreement (R. 183-197), the purpose of which was to resolve the litigation through a corporate reorganization. Petitioner itself was not a party to the Settlement Agreement.

After the Settlement Agreement of 1942 had been partially performed through a corporate merger and certain other steps, the parties to the agreement fell into a series of disputes over the manner of its further consummation. A complete impasse was reached and as a result petitioner in 1946, finding itself holding, as trustee and as depositary under the Debenture Holders' Agreement, both new and old securities of Pioche, and being in receipt of conflicting instructions from Pioche and the Debenture Holders' Committee as to what to do with the securities, filed *in the original action*, with the permission of the District Court and with defendants' express statement of no objection to its filing (R. 1132), a supplemental complaint (R. 166-220) pursuant to F.R.C.P. Rule 15(d),[2] setting forth the transactions and occurrences which had transpired subsequent to the institution of the original

[2] Rule 15(d) of the Federal Rules of Civil Procedure provides:

"(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor."

action. The supplemental complaint prayed, *inter alia,* for an order directing the parties to perform the remaining unperformed obligations under the Settlement Agreement (R. 182).

To the supplemental complaint the defendants filed an answer (R. 222-262) and also a compulsory counterclaim under F.R.C.P. Rule 13(a) for $3,000,000 (R. 262-281), charging petitioner with having participated with members of the Debenture Holders' Committee in an alleged conspiracy to block consummation of the Settlement Agreement. The counterclaim, embracing the same subject matter as the supplemental complaint, prayed, *inter alia,* as did the supplemental complaint, for an order directing performance by the parties thereto of the remaining unperformed obligations of the Settlement Agreement (R. 281). Respondent Baker filed a complaint in intervention (R. 728-730) wherein he adopted by reference the averments of the answer and counterclaim to the supplemental complaint.

The District Court, on a completely documented record, granted petitioner's motion for summary judgment for part of the relief prayed in the supplemental complaint. At the same time the District Court dismissed the counterclaim to the supplemental complaint and Baker's complaint in intervention. However, it expressly reserved jurisdiction over the cause and the parties thereto for the purpose of entering such further orders as might from time to time be necessary to bring about full compliance with the terms of the Settlement Agreement, to the end that a final decree might ultimately be entered terminating the action (R. 1053-1070).

Defendants and Baker appealed. The Court of Appeals first held that the appeal was not premature (191 F. 2d 399), notwithstanding that the District Court had made no determination as provided in F.R.C.P. Rule 54(b) and notwithstanding that the District Court had expressly reserved jurisdiction to enter further necessary orders

(R. 1070). Subsequently, in its second opinion, the Court of Appeals "reversed with instructions to dismiss" (R. 1171; 202 F. 2d 944 at 949), for the reason that the Debenture Holders' Committee, which was not itself a party to the action and all of whose members were beyond the District Court's jurisdiction, was an indispensable party to the relief sought in the supplemental complaint, since such relief involved the meaning and manner of performance of the Settlement Agreement, to which the members of the Debenture Holders' Committee were signatories.

Thereupon, the defendants, but not the intervenor, petitioned the Court of Appeals for a further hearing, praying for reversal of the District Court's dismissal of the counterclaim to the supplemental complaint. The Court of Appeals, acting favorably upon such petition, then filed a third opinion, reversing the District Court's dismissal of Pioche's counterclaim to the supplemental complaint, with leave to Pioche to amend if so advised (R. 1174-1177). An order denying petitioner's request for a further hearing on the correctness of this reversal of the dismissal of the counterclaim was entered on September 2, 1953 (R. 1178).

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In holding that the District Court's dismissal of the counterclaim to the supplemental complaint should be reversed.

2. In holding that the supplemental complaint itself should be dismissed.

3. In entertaining the appeal before the case was appealable.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals, which is fundamental to the further conduct of the litigation, is upon a novel but vital question of federal law regarding the effect of the absence of indispensable parties. It is a question which has not, but should be, settled by this Court, especially since the decision is believed to conflict in principle with the decisions of this Court and other federal courts, and to depart so far from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

1. Conflict in principle with decisions of this Court and other federal courts as to the effect, on a compulsory counterclaim, of dismissal of a complaint for jurisdictional reasons.

This Court has held that a dismissal of a complaint *on the merits* does not necessitate dismissal of a compulsory counterclaim thereto. *Moore* v. *New York Cotton Exchange,* 270 U. S. 593 (1926). However, as there pointed out (270 U. S. at 608-610) and uniformly held by the federal Courts of Appeals and Court of Claims, if a complaint is dismissed on *jurisdictional* grounds, a counterclaim to the complaint must be dismissed also, unless there is an independent ground of federal jurisdiction to support the counterclaim. *Isenberg* v. *Biddle,* 125 F. 2d 741 (App. D. C. 1941); *Baltimore & Ohio RR Co.* v. *United States,* 34 Ct. Cl. 484 (1899); *Yale & Towne Mfg. Co.* v. *United States,* 67 Ct. Cl. 618 (1930); *First National SS Co.* v. *United States,* 106 Ct. Cl. 601 (1946); and cases collected in 3 *Moore's Federal Practice* (2d Ed. 1948), ¶ 13.15.

The Court of Appeals paid lip service to this latter principle, observing (R. 1175):

> "The counterclaim persists where it is supported by an independent ground of federal jurisdiction,

> Isenberg *v.* Biddle, D. C. Cir., 125 F. 2d 741; 3 Moore's Federal Practice § 13.15. Pioche is a resident of Nevada, Fidelity of Pennsylvania; and federal jurisdiction thus rests on diversity."

However, having thus stated the rule, the Court of Appeals proceeded to ignore it by allowing the counterclaim in this case to survive the dismissal (which it had just ordered) of the supplemental complaint, even though no independent ground of federal jurisdiction, separate from that upon which the supplemental complaint itself rested, was present to support the counterclaim. Plainly, diversity of citizenship alone was the basis of federal jurisdiction over the supplemental complaint and likewise over the counterclaim. No *independent* ground of federal jurisdiction, different from that over the supplemental complaint, existed with respect to the counterclaim. Therefore the rule quoted by the Courts of Appeals, if applicable at all, called for dismissal of the counterclaim.

Isenberg v. *Biddle,* 125 F. 2d 741 (App. D. C. 1941), on which the Court of Appeals relied, involved an entirely different situation, since there the counterclaim was actually supported by independent grounds of federal jurisdiction. Isenberg had attempted to sue the Government under Section 9 of the Trading With The Enemy Act (Act of October 6, 1917, Chapter 106, 40 Stat. 419, as amended; 50 U. S. C. Appendix, § 9) for a type of damages as to which the Government had not by that section surrendered its immunity from suit. His complaint, accordingly, had to be dismissed for lack of jurisdiction. The Government's counterclaim, however, was supported by independent grounds of federal jurisdiction, particularly including the right of the Government, under Article III, Section 2 of the Constitution of the United States, to resort at any time to its own courts to redress a wrong done to it.

2. Presence of important question of federal law which has not but should be settled by this Court.

Concededly, as the Court of Appeals noted, its order for dismissal of the supplemental complaint in the present case was not because of lack of federal "jurisdiction" in the narrow sense of that term. Rather it was because of what the Court of Appeals, disagreeing with the District Court, determined to be an absence of indispensable parties in the person of the Debenture Holders' Committee, whose presence before the District Court was regarded by the Court of Appeals as essential in order that the District Court might entertain the supplemental complaint. Yet, notwithstanding this determination of any lack of power in the District Court to entertain the supplemental complaint, and notwithstanding that, as noted elsewhere herein, the counterclaim to the supplemental complaint involved the same subject matter and basic issue as to the meaning and manner of performance of the Settlement Agreement, the Court of Appeals reversed the dismissal of the counterclaim to the supplemental complaint, although the Debenture Holders' Committee was equally absent as regards the counterclaim. In making its decision on that score the Court of Appeals passed upon a novel and important question which this Court should settle in the interests of orderly judicial procedure in the federal courts and in the interests of sound administration of its Rules of Civil Procedure.

It is submitted that the absence of indispensable parties (*i. e.*, the Debenture Holders' Committee), which in the eyes of the Court of Appeals necessitated a dismissal of the supplemental complaint, was as fundamental to the power of the District Court to entertain the proceedings as any absence of federal jurisdiction in the narrow sense. In *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305 (1923), this Court noted that jurisdiction is really "the power to decide a justiciable controversy." The absence of indispensable parties deprives a court of such power. Indeed,

the Court of Appeals in the instant case conceded that "the concept of indispensability goes beyond federal jurisdiction and concerns the very power or the right of the court to make an equitable adjudication, where an indispensable party is not before it" (R. 1165; 202 F. 2d at 946). Many of the modern authorities say flatly that the absence of indispensable parties is "jurisdictional" in diversity cases, inasmuch as the court is thereby deprived of power to deal with the subject matter of the action. *Calcote* v. *Texas Pacific Coal & Oil Co.*, 157 F. 2d 216 (C. C. A. 5th, 1946), certiorari denied 329 U. S. 782, rehearing denied 329 U. S. 830, and cases collected in Commentary, 5 Federal Rules Service 820, 821.

Calcote v. *Texas Pacific Coal & Oil Co., supra,* while concededly not in all respects on all fours factually with this one, appears nevertheless to be the only reported federal case in which the court, having had to dismiss the main action for want of indispensable parties, was also confronted with the question whether a counterclaim thereto must for that reason also be dismissed. It was there held by the Court of Appeals for the Fifth Circuit that in such a situation the counterclaim fell with the main action, irrespective of "whether federal jurisdiction of it be ancillary or independent." 157 F. 2d at 220. In the present case the Court of Appeals did not refer to the *Calcote* case.

3. Need for exercise of this Court's power of supervision to prevent departure from accepted and usual course of judicial proceedings.

It is submitted that the Court of Appeals erred in entertaining the appeal in the first place, inasmuch as the District Court, when dismissing the counterclaim and granting *part* of the relief requested in the supplemental complaint, had expressly reserved jurisdiction to enter such further orders as from time to time might be necessary to bring about full compliance with the terms of the Settlement Agreement and enforcement of its provisions (R. 1070),

and had never made a determination of the type expressly provided in F.R.C.P. Rule 54(b).[3] The status of the multiple-claim litigation in the District Court was therefore not yet ripe for appeal, notwithstanding that the District Court had dismissed the counterclaim. *Maizel* v. *Epstein*, 196 F. 2d 44 (App. D. C. 1952).

Furthermore, and even more importantly, it should be noted that the counterclaim to the supplemental complaint in the present case is a "compulsory" one under F.R.C.P. Rule 13(a),[4] since it expressly (R. 262-263) arises out of the same transaction and occurrence that is the subject matter of the supplemental complaint. This subject matter is the Settlement Agreement, its meaning and performance. Indeed, both the supplemental complaint (R. 182) and the counterclaim thereto (R. 281) expressly and equally pray for an order directing the parties to perform the remaining unperformed obligations of the Settlement Agreement.

Even the Court of Appeals explicitly recognized that the counterclaim to the supplemental complaint arises out of the same transaction and occurrence as the supplemental complaint and is therefore in the compulsory class (R. 1175). The Court of Appeals, however, took the position

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[3] Rule 54(b) of the Federal Rules of Civil Procedure provides:

"Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

[4] Rule 13(a) of the Federal Rules of Civil Procedure provides:

"(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, eff. March 19, 1948."

that because the counterclaim used *tort* terminology by labeling nonperformance of the Settlement Agreement as a "conspiracy" between the Debenture Holders' Committee and petitioner, whereas the supplemental complaint described the nonperformance of the Settlement Agreement in terms of contract law, the Debenture Holders' Committee was not indispensable to the District Court's power to adjudicate the counterclaim, although that Committee was, according to the view of the Court of Appeals, indispensable to the power of the District Court to adjudicate the supplemental complaint itself. *The Court of Appeals thereby ignored the indisputable fact that every word of the counterclaim is based upon the respondents' own particular interpretation of the Settlement Agreement, which is at odds with the interpretation made by the Debenture Holders' Committee.* It was this disagreement which led to the impasse regarding further performance and in turn led to the filing of the supplemental complaint with defendants' consent. It is therefore obvious that no disposition of the counterclaim to the supplemental complaint can be made without deciding the meaning and manner of performance of the Settlement Agreement; and the members of the Debenture Holders' Committee, as signatories to the Settlement Agreement, are manifestly as indispensable to a resolution, under the counterclaim, of the meaning and manner of performance of the Settlement Agreement as they are to its resolution under the supplemental complaint.

To hold that by merely tagging the counterclaim as a "tort" claim against "joint" tortfeasors and the supplemental complaint as involving a "contract" claim, when fundamentally they both involve the single issue of the legal effect of the Settlement Agreement, is to yield substance to form and leave the petitioner, a mere trustee and stakeholder, to face trial alone upon the counterclaim, although such a trial would necessarily be a protracted one involving the opposing interpretations of the Settlement Agreement by the respondents and the

Debenture Holders' Committee, and although the Court of Appeals has expressly conceded (R. 1165) that petitioner has no means of bringing the Debenture Holders' Committee before the District Court. The decision of the Court of Appeals is thus "fundamental to the further conduct of the case" and makes review by this Court now, rather than after a long and costly trial, desirable from every standpoint. *United States* v. *General Motors Corporation,* 323 U. S. 373, 377 (1945).

Furthermore, the decision of the Court of Appeals in reinstating the counterclaim to the supplemental complaint, after ordering a dismissal of the supplemental complaint to which it is addressed, defeats the salutary purpose of F.R.C.P. Rule 13(a). Under that Rule a compulsory counterclaim is simply auxiliary or ancillary to the main controversy (3 Moore's Federal Practice (2d Ed. 1948), ¶ 13.15), and the function of the Rule, like that of Equity Rule 30 from which it was taken, is to require that all claims arising out of the same subject matter be determined in a single action, so as to avoid a multiplicity of suits. 6 Cyc. Fed. Proc. (3rd Ed. 1951), Sec. 16.02. To allow respondents to proceed on their counterclaim to the supplemental complaint, while ordering a dismissal of the supplemental complaint for lack of power in the District Court to entertain the supplemental complaint, is to frustrate this plain purpose of the Rule.

In *McMillan* v. *Lorimer,* 160 La. 400, 107 So. 239 (1926), where a rule with a purpose similar to that of Rule 13(a) was involved, the court held (107 So. 241):

> "The object of the articles of the Code of Practice authorizing demands in reconvention is to enable the parties litigant, at the election of the defendant, to adjust their conflicting claims in one action, thereby avoiding a multiplicity of suits. * * * On the other hand, where defendant causes the dismissal of the main suit by showing that plaintiff has mistaken his remedy, he cannot insist upon a trial of the demand in reconvention afterward. If this was not so

the purpose of the Codal articles would be frustrated, since the conflicting claims of the parties would remain unsettled, the judgment of dismissal not constituting *res judicata*, and plaintiff would be relegated to another action to enforce his rights."

The record in this litigation vividly discloses the extraordinary efforts which petitioner as trustee and depositary made to resolve the difficulties which had arisen in connection with the consummation of the Settlement Agreement. Such effort culminated in seeking the aid of the District Court by filing the supplemental complaint. However, as a result of the three piecemeal decisions of the Court of Appeals, petitioner now finds itself in a position wholly anomalous. The third of the decisions, if not reversed, will require the petitioner to stand trial alone in the District Court of Nevada on the charges asserted against it in the counterclaim to the supplemental complaint although the District Court is precluded by reason of the second decision of the Court of Appeals from considering the issues embracing the same subject matter raised by the supplemental complaint. It is respectfully submitted that such an unjust result is not supported by any rule of federal law or procedure.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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J. TYSON STOKES,
WILLIAM J. FORMAN,
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MORGAN, LEWIS & BOCKIUS,
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Of Counsel.

Office - Supreme Court, U.S.
FILED
OCT 28 1953
HAROLD B. WILLEY, Clerk

SUPPLEMENTAL TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

October Term, 1953

No. 413

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Petitioners,

vs.

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-23-53

United States Court of Appeals
for the Ninth Circuit

Case No. 12,865

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY and JOHN JANNEY,

Appellants,

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, a Corporation, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

MOTION TO DISMISS APPEAL

Comes Now Fidelity-Philadelphia Trust Company, a corporation, Trustee, surviving appellee in the above-entitled proceeding, and moves the above-entitled Court for an order dismissing the appeal of appellants herein upon the ground that this Honorable Court is without jurisdiction thereof for the reason that the order appealed from is not a final decision of the District Court within the meaning of Section 1291 of the Judicial Code, as amended, nor is it an interlocutory order or decree from which an appeal can be taken under the provisions of Section 1292 of the Judicial Code, as amended.

[Endorsed]: Filed Feb. 27, 1951.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Monday, March 5, 1951.

Before: Denman, Chief Judge;
Healy and Bone, Circuit Judges.

ORDER SUBMITTING MOTION TO DISMISS

Ordered motion of appellee, Fidelity-Philadelphia Trust Company, to dismiss appeal herein presented by Mr. William J. Forman, counsel for appellee, in support of said motion, and by Mr. Francis T. Cornish and Thomas A. Cooke, counsel for appellants, in opposition thereto, and submitted to the Court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Friday, August 31, 1951.

Before: Denman, Chief Judge;
Healy and Bone, Circuit Judges.

ORDER DIRECTING FILING OF OPINION ON MOTION TO DISMISS AND DENYING MOTION

Ordered that the typewritten opinion this day rendered by this Court in above cause on motion

of appellees to dismiss appeal be forthwith filed by the clerk.

Pursuant thereto, and after consideration of the motion of appellees for dismissal of appeal herein, It Is Ordered that said motion be, and hereby is, denied.

United States Court of Appeals,
Ninth Circuit
No. 12,865

PIOCHE MINES CONSOLIDATED, INC.; PIOCHE MINES COMPANY and JOHN JANNEY,

Appellants,

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, a Corporation, Trustee, and E. CLARENCE MILLER and EDWARD C. DALE,

Appellees.

Upon Motion to Dismiss Appeal.

Before: Denman, Chief Judge, and
Healy and Bone, Circuit Judges.

Denman, Chief Judge:

OPINION

This is a motion by the appellee, Fidelity-Philadelphia Trust Company, to dismiss an appeal by Pioche Mines Consolidated, Pioche Mines and others, from a summary judgment of the District Court entered on May 11, 1950, and directing the parties herein to perform a Settlement Agreement

executed by them. That Agreement provided for a reorganization of the appellant corporations and another corporation into a single company and was intended by the parties as a compromise of previous litigation between them.

Performance of this Agreement involves, among other things, the transfer of new income bonds by the appellants to the appellee in return for old debentures of the companies undergoing reorganization. It will also mean that the appellants must endeavor to sell for cash preference notes in the new company so that legal expenses of the reorganization may be paid.

The successful suitor under the summary judgment seeks to have a dismissal of this appeal on the ground that the District Court has not disposed of matters in the original complaint and has therefore violated Rule 54 (b), Federal Rules of Civil Procedure.[1] We think no disposition of the original complaint was necessary. A supplemental complaint praying for enforcement of the Settlement Agree-

[1] "(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

ment was also filed; and the appellee prevailed on this claim. In it was merged by virtue of the Settlement Agreement the controversy represented by the original complaint and answer thereto. This merger of all matters between the parties in the supplemental complaint is no more in effect than an amendment of the original complaint. When judgment is rendered on an amended complaint, no dismissal of the original unamended complaint is necessary.

The appellee contends the order is not appealable because the District Court has reserved power to make further orders in the case. Assuming that the other requirements of finality are met, a "reservation to make further orders does not mean orders inconsistent with the finality of the judgment." Johnson v. Wilson, 118 F. 2d 557 (Cir. 9).

Furthermore, the order is appealable despite the reservation of power by the District Court since the order requires the immediate disposition of property. Preference notes must be sold to finance the reorganization scheme provided for in the Settlement Agreement; and transfers of bonds between the parties must be made. This brings the case within the rule of Dean v. Nelson, 7 Wall. 345; cf. Forgay v. Conrad, 6 How. 201; Carondelet Canal & Nav. Co. v. Louisiana, 233 U.S. 362; Radio Station WOW v. Johnson, 326 U.S. 120.

The motion to dismiss is denied.

/s/ WILLIAM DENMAN,
Chief Judge.

[Endorsed]: Filed Aug. 31, 1951.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, SUPPLEMENTAL TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five pages, numbered from and including 1181 to and including 1185 to be a full, true and correct copy of the entire supplemental record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of October, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.

Office - Supreme Court
FILED
NOV 13 19
HAROLD B. WILLEY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 413

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee,
Petitioner,
vs.
PIOCHE MINES CONSOLIDATED, INC., PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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First National Bank Building, Reno, Nevada,
Of Counsel.

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In the Supreme Court
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United States

OCTOBER TERM, 1953

No. 413

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee,
Petitioner,
vs.
PIOCHE MINES CONSOLIDATED, INC., PIOCHE MINES COMPANY, JOHN JANNEY and RICHARD K. BAKER,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondents, Pioche Mines Consolidated, Inc., Pioche Mines Company, and John Janney respect-

fully reply to the petition of Fidelity-Philadelphia Trust Company which prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the three judgments rendered by that Court, first, refusing to dismiss as premature the appeal of these replying parties; second, reversing, for lack of indispensable parties, a summary judgment directing one party to a settlement agreement, other parties obligated being absent from the jurisdiction, to do acts which that settlement agreement did not require; and, third, reversing a judgment dismissing a supplemental counterclaim, wherein independent grounds of federal jurisdiction were shown, for failure to state any basis for relief.

OPINIONS BELOW.

The petitioner correctly refers to the pages in the record and the reported decisions where the three opinions may be found except that the third opinion may now be found in 206 F. (2d) 336 (1953).

JURISDICTION.

The petition correctly refers to 28 U.S.C. Section 1254(1); Act of June 25, 1948, Chapter 646, Section 1, 62 Stat. 928, as the statutory source for the jurisdiction, if any, of this Court to entertain the petition. However, as we show this Honorable Court in the ensuing pages: none of the opinions are in conflict

with any decisions of "another circuit court of appeals on the same matter;" none of the opinions decide any important question of local law "in a way probably in conflict with local decisions"; nor do any of the opinions decide "an important question of federal law which has not been, but should be, settled by this court", or "in a way probably in conflict with applicable decisions of this court", nor have any of the opinions "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for any exercise of this court's power of supervision". Therefore, this case is not within the scope nor the purview of Rule 38, paragraph 5(b), of the Rules of the Supreme Court of the United States as amended, May 27, 1948, and hence the petition should not be entertained.

QUESTIONS PRESENTED.

Petitioner's statement of questions presented requires these corrections:

The issues raised by the Supplemental Complaint and by the Supplemental Counterclaim do not "involve inextricably and equally the meaning and legal effect of a multi-party written contract".

The District Court was not directed to proceed with the trial of a counterclaim "against the fiduciary plaintiff".

The Court of Appeals did not hold "that the District Court has no jurisdiction over the Supplemental

Complaint because of the absence of parties thereto held to be the real parties in interest and indispensable", but they did hold that indispensable parties were absent and that jurisdiction over such parties was necessary to further proceeding on the Supplemental Complaint.

The question really presented by the record in this case is:

If federal jurisdiction of a complaint is based on diversity of citizenship and federal jurisdiction of a counterclaim is independently based on diversity of citizenship, and the Court dismisses the complaint solely because of the absence of indispensable parties whose presence would not have destroyed jurisdiction but whose rights would be affected by granting the relief prayed for by the complaint, must the Court *ipso facto* dismiss the counterclaim if it can give the full relief which the counterclaim prays and not affect the rights of those absent parties?

A negative answer to this question requires that the writ of certiorari be denied.

STATEMENT OF THE CASE.

In its opinion, 202 F. (2d) 944 (R. 1160-1171), the Court of Appeals summarized the facts sufficiently to demonstrate that the rights of the Debenture Holders' Committee would be affected by granting the relief asked by the Supplemental Complaint, and hence indispensable parties had not been joined

and the action could not proceed on the Supplemental Complaint. The Court of Appeals did not hold that it had no Federal Jurisdiction of the Supplemental Complaint. It did not dismiss the Supplemental Complaint for lack of federal jurisdiction. It dismissed the Supplemental Complaint solely because it had no jurisdiction over parties whose presence was indispensable to the relief sought by the Supplemental Complaint. In its final opinion, 206 F. (2d) 336 (R. 1174-1178) the Court of Appeals did not attempt to fully state the facts pertaining to the Supplemental Counterclaim.

This counterclaim alleges that a separate agreement was entered into between Petitioner and Respondent. The Debenture Holders' Committee was not a party to this agreement. The agreement was that if respondent would send income bonds to the Petitioner, which the Settlement Agreement did not require them to do, Petitioner would exchange the income bonds for old debentures which the Petitioner represented it held subject to irrevocable instructions to exchange for income bonds. Respondent sent the income bonds with express instructions to immediately exchange them and Petitioner accepted them subject to those instructions. The Petitioner violated those instructions. First it attempted to invalidate the income bonds through the Securities and Exchange Commission. Then it disregarded the advice of its general counsel, refusing to make the exchange, refusing to tender the income bonds for exchange, and under contrary directions from the Debenture Holders' Committee refusing to

return the income bonds. (R. 269.) In violation of their trust Petitioner also used their possession of the income bonds to coerce Respondent to do things which the Settlement Agreement did not require. (R. 274, 275.)

The counterclaim also charges that the Petitioner tortiously interfered with the performance of the Settlement Agreement and that it perpetuated the conspiracy to use the debentures as a means of wrecking the issuing company and acquiring its properties. Thus the Supplemental Counterclaim is asserted against Petitioner for breach of contract and tort, entirely apart from its duties as Trustee under any Trust Indenture or Deposit Agreement. (R. 263-281.)

Petitioner answered the Supplemental Counterclaim on the merits, raising none of the objections here raised, and thus submitted itself to the jurisdiction of the Court.

The Court can adjudicate the rights of the Petitioner and the Respondent arising from the breach of the agreement for exchange, to which the Debenture Holders' Committee was not a party, without affecting the rights of the debenture holders. The Court can hold the Petitioner responsible in damages for tortiously interfering with the performance of the Settlement Agreement without affecting the rights of the debenture holders. The Court can adjudicate Petitioner's liability for attempting to wreck the Respondent and acquire its properties without affecting the rights of the debenture holders.

While it is true that in granting all of the relief asked by the Supplemental Counterclaim the Court may be called upon to interpret the Settlement Agreement, such a construction will not affect the rights of the absent parties, nor will it require any party to the Settlement Agreement to do any act of performance of the Settlement Agreement. *The test is not must the agreement be construed, but, will the construction affect the rights of absent parties.*

ERRORS.

It is submitted that the errors were committed by the District Court, they have all now been corrected, and the Court of Appeals did not err.

REASONS FOR NOT GRANTING A WRIT.

Petitioner assails the judgment of the Court of Appeals which dismisses its Supplemental Complaint because to grant the relief thereby sought would affect the rights of absent parties, and leaves Petitioner to answer the Supplemental Counterclaim which seeks relief that does not affect the rights of absent parties. Petitioner asks this Court to decide that it can submit itself to the jurisdiction of the District Court in Nevada to tie up properties, but when its object cannot be obtained, that jurisdiction ceases.

1. **THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISIONS OF THIS AND OTHER FEDERAL COURTS.**

The applicable rule is stated by Moore as follows:

> "If the complaint is dismissed for lack of federal jurisdiction the counterclaim must be dismissed also, *unless it has independent grounds of jurisdiction to sustain it.*" (Italics ours for emphasis.)
>
> 3 Moore's Federal Practice (2nd Ed. 1950) p. 41.

Petitioner tries to create a conflict where none exists between the decision of the Court of Appeals and *Isenberg v. Biddle,* 125 F. (2d) 741 (App. D.C. 1941), by giving a tortuous twist to the words used.

The Petitioner contends that independent grounds for federal jurisdiction "separate from that upon which the Supplemental Complaint itself rested", must be present to support the counterclaim, and that the independent grounds for federal jurisdiction must be "different from that over the Supplemental Complaint."

This is not the law.

The basis for jurisdiction must be "independent", and that the basis is "different" in any particular case may be a coincidence, but is not a requirement of the law. What is necessary is that the basis shall be "independent", which necessarily follows, where the basis for federal jurisdiction of the counterclaim remains after the complaint is dismissed.

After the complaint is dismissed for lack of jurisdiction, if there is still left a basis for federal jurisdiction of the counterclaim, that basis is necessarily "independent."

In the instant case the Supplemental Complaint was not dismissed for lack of federal jurisdiction, but for lack of indispensable parties. Federal jurisdiction of the Supplemental Counterclaim still remained, based on diversity of citizenship, and all parties to the Supplemental Counterclaim are before the Court. No reason exists why the trial of the issues cannot proceed because the interest of absent parties will not be affected, and the basis for federal jurisdiction remains.

Because of the diversity of citizenship Petitioner is answerable in the Federal Courts for injury caused by its wrongful acts pleaded in the Supplemental Counterclaim. Therefore their only possible objection relates to venue, not jurisdiction. As the Court of Appeals points out they have waived that objection by answering the counterclaim on the merits. They selected the forum.

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2. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

It is clearly established that lack of indispensable parties and lack of jurisdiction are two entirely separate concepts. Petitioner's assertion that they are

equivalents is directly contrary to the decisions of this Court, starting with *Mallow v. Hinde,* 12 Wheat. 193 (1827)[1] and *Shields v. Barrow,* 17 How. 130 (1854),[2] that a failure to join indispensable parties is not a matter of jurisdiction.

In so far as the question of federal jurisdiction is concerned *Calcote v. Texas Pacific Coal & Oil Co.,* 157 F. (2d) 216 (C.C.A. 5th, 1946), is entirely different from this case and the Court does not even discuss the question involved here.

Two things must be noted about *Calcote v. Texas Pacific Coal & Oil Co.,* 157 F. (2d) 216 (C.C.A. 5th, 1946). The first is that jurisdiction was based solely on diversity of citizenship. The matter of indispensable parties became a matter of jurisdiction, only because *had the indispensable parties been joined* there would have been no diversity of citizenship.

The second is that the Court did not dismiss the counterclaim, as Petitioner said (Pet. p. 10), "Irrespective of whether federal jurisdiction of it be ancil-

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[1] "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

Mallow v. Hinde, 12 Wheat. 193, 198 (1827).

[2] "Thomas R. Shields, and his other five indorsers, had such a direct and immediate interest in the contract of compromise, and that interest was so entire and undivisible, that without their presence, no decree on the subject could be made • • •

"If, at the hearing, the court finds that an indispensable party is not on the record, *it refuses to proceed.*" (Italics ours.)

Shields v. Barrow, 17 How. 130 (1854).

lary or independent" but dismissed it because had the parties indispensable to a determination of the issues of the counterclaim been joined, there would have been no diversity of citizenship to support jurisdiction of the counterclaim.

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3. THERE HAS BEEN NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

That the appeal was not premature is settled by such cases as *Dean v. Nelson,* 7 Wall. 158 (1869), *Forgay v. Conrad,* 6 How. 201 (1848), *Carondelet Canal & Navigation Co. v. Louisiana,* 233 U.S. 362 (1913), *Radio Station W.O.W. v. Johnson,* 326 U.S. 120 (1944), in that despite any reservation by the District Court of power to make further orders, the judgment appealed from required the immediate disposition of property. (R. 1185.)

Under the guise of claiming a departure from the accepted and usual course of judicial proceedings Petitioner misrepresents the record in claiming that the Court of Appeals took a position because the counterclaim used tort terminology by labeling nonperformance of the Settlement Agreement as a conspiracy. What the Court held was that the counterclaim stated a claim for tortious interference by Petitioner with the contractual relations between Respondent and the Debenture Holders' Committee. (R. 1176.)

The tortious conduct of Petitioner is set forth in detail in the Supplemental Counterclaim which recites

the wrongful acts which afford the basis for the Court's holding. Included are charges of breach of the independent contract under which the income bonds were delivered to Petitioner; of breach of trust in so gaining possession of these securities and then refusing to perform the agreed services; of refusing to return the securities; of retaining possession of them; of using their wrongfully gained possession as the basis for threats and extortionate demands; of making incorrect representations to the Securities and Exchange Commission in an effort to invalidate the income bonds; of refusing to have an audit of its debenture account; of refusing to give correct information as to their account; and of otherwise obstructing the performance of the Settlement Agreement in violation of their trust obligation. (R. 263-281.)

Petitioner incorrectly states that the Court of Appeals ignored the fact that the counterclaim set forth Respondents' interpretation of the Settlement Agreement and that there was a disagreement which led to an impasse with the Debenture Holders' Committee. On the contrary, the impasse resulted from the acts of Petitioner in refusing to exchange the income bonds for the old debentures or to return them to the issuing company.

The record clearly discloses that the decisions of the Court of Appeals were not reached by merely tagging the Supplemental Counterclaim as a tort claim against joint tort feasors and the Supplemental Complaint as involving a contract claim.

It is true, that if full recovery is had on all of the bases for counterclaim set forth the Court must construe the same Settlement Agreement which it refused to order performed because of absence of indispensable parties. The difference between the Supplemental Complaint and the Supplemental Counterclaim is this. If at a trial of the Supplemental Complaint the District Court ordered performance of the Settlement Agreement, it would necessarily affect the rights of the debenture holders. But if at the trial of the Supplemental Counterclaim the Court places a construction upon the Settlement Agreement this will not in any way affect the rights of the debenture holders. *The test is not whether the Court has to construe the Settlement Agreement. The test is, if the Settlement Agreement is construed, will the rights of absent parties be affected.*

This Court should not permit the processes of law to be abused further and properties thereby longer involved. Those responsible for wrongs should not be shielded longer from their obligation to make redress. Petitioner started a groundless suit and levied a groundless attachment. It was met with a counterclaim. When cornered, Petitioner sought escape by its attorney proposing a settlement. Petitioner induced the Respondents to unalterably change their position in reliance upon its assurances of prompt performance of the settlement, which would have left its properties free for operation.

The position from which Petitioner begs this Court to relieve it is not "anomalous". Had Petitioner

wanted "to resolve the difficulties" it should have immediately deposited what it held, joined all parties to the settlement so that all could be heard and be bound, and simply asked the Court to instruct it as trustee. But it did not do so. Instead, it disregarded the advice of its general counsel that it return the income bonds to the issuing company. (R. 320.) Then it endeavored to step into the shoes of the Debenture Holders' Committee and tried to enforce the Settlement Agreement to which it was not a party, and was met by a Supplemental Counterclaim for damages caused after the original counterclaim was filed.

There was no impasse between the parties to the Settlement Agreement except what Petitioner created by getting possession of the income bonds which the Settlement Agreement only required be issued, then refusing to tender them and refusing to return them to the issuing company so it could tender them and complete the settlement.

It was for this wrongful act, among others, that the Supplemental Counterclaim sought damages, and Petitioner answered the Supplemental Counterclaim on the merits. No other parties are indispensable to the determination of that controversy. The diversity of citizenship of the parties gives the District Court in Nevada jurisdiction to try it. For this Court to now shield Petitioner from answering in damages for its wrongful acts would depart from the accepted and usual course of judicial proceedings.

There is also every moral reason why this Court should permit the trial of the issues of the Supple-

mental Counterclaim to proceed as has been directed by the Court of Appeals, and should deny the Petition for a Writ of Certiorari.

Dated, Berkeley, California,
November 11, 1953.

Respectfully submitted,
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